

**A Chua Seng Sam Realty Sdn Bhd v Say Chong Sdn Bhd & Ors
and other appeals**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02-1731
OF 2009, W-02-1732 OF 2009 AND W-02-1733 OF 2009
ZALEHA ZAHARI, MOHD HISHAMUDIN AND LINTON ALBERT
JJCA
7 SEPTEMBER 2012

C *Tort — Negligence — Adjoining properties — Collapse of retaining wall —
D Landslide — Whether negligent in constructing and maintaining safety of
retaining wall — Whether wall structurally defective and in precarious state —
Whether there was causative link to prove cause of injury — Whether adequate
consideration given to evidence of expert witnesses*

E The first plaintiff was a company and the registered owner of a piece of land on
a hill slope where a double-storey bungalow was erected. Besides being the
shareholders and directors of the first plaintiff's company, the second and third
plaintiffs were also residents of the bungalow. The said bungalow was built at
the uppermost part of the land where along the hill slope below the bungalow,
the first plaintiff had erected a retaining wall of about 22 feet high in 1983. On
the other hand, the first defendant's land was located at the lower part of the hill
slope, adjacent to the first plaintiff's land. The first defendant entered into a
F lease agreement with the second defendant where the first defendant leased out
her land to the second defendant for a term of ten years. The second defendant
planned to build a bungalow on the land and therefore appointed the third
defendant, an independent contractor. For the construction of the bungalow,
the second defendant appointed a consulting engineer ('the fifth defendant')
G and an architect ('the sixth defendant'). The excavation work was carried out
within the first defendant's land with a distance of about 20 feet between the
excavation point and the first plaintiff's retaining wall. On 11 December 1993,
the first plaintiff's retaining wall collapsed resulting in a landslide. The
plaintiffs' alleged that the defendants' had carried out the excavation work in a
H negligent manner and that caused the first plaintiff's retaining wall to collapse.
The defendants argued that the first plaintiff was negligent in constructing and
maintaining the safety of the retaining wall resulting in the wall being
structurally defective and in a precarious state. The first and second defendants
counterclaimed against the first plaintiff for negligence. However, the first
I defendant did not come to court to give evidence to prove her claim against the
first plaintiff. In the High Court, the learned judge gave judgment in favour of
the plaintiffs. The judgment obtained was against all the defendants except the
fourth defendant, who, before the trial, in an interlocutory application, had
successfully applied to the court to have the suit against it be struck off.

Dissatisfied, the remaining defendants except the third defendant, appealed against the decision. A

Held, allowing the defendants' appeal with costs; dismissing the first defendant's counterclaim; setting aside order of court below in part:

- (1) It is trite law that in an action for negligence, the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. The plaintiffs' failed to prove on a balance of probabilities that it was the excavation work, that was being carried out by the third defendant on the first defendant's land which had caused the retaining wall on the first plaintiff's land to collapse (see paras 32–34). B C
- (2) The cause of the plaintiff's wall collapsing was due to its precarious structure and condition. Both the expert witnesses admitted that there were existing cracks on the wall. This was made worse by the existence of plants growing within the cracks. All these are indications that the wall was already defective and in a deplorable state prior to its collapse. Therefore, the effective cause of the plaintiff's injury was due to the precarious condition of the wall (see para 43). D
- (3) The credibility and evidence of the plaintiffs' expert witnesses were in doubt. His evaluation and subsequent findings of the cause of the collapse of the first plaintiff's retaining wall was based heavily on the analysis of the stability of the slope. However, the analysis was never prepared by him. As such he could not be said to have had personal knowledge of the analysis or calculations made. To make matters worse, the said analysis was prepared in April 1999, meaning that it was prepared some six years after the collapse of the wall (see para 39). E F
- (4) The learned High Court judge fell into serious error in failing to give adequate consideration to the evidence of the defendants' expert witness DW7, who had prepared three reports on the cause of the collapse of the first plaintiff's retaining wall. Two of the reports were based on his investigation on site; and the third report was based on drawings supplied by the first plaintiff. The learned High Court judge also fell into error when he gave undue weight to the evidence of PW5 that the plaintiffs' wall was above the minimum standard in the factor of safety. Such evidence should have been weighed against the expert evidence of DW7 (see paras 49–51). G H

[Bahasa Malaysia summary I

Plaintif pertama merupakan sebuah syarikat dan pemilik berdaftar sebidang tanah di lereng bukit di mana sebuah banglo dua tingkat telah didirikan. Selain menjadi pemegang saham dan pengarah syarikat plaintif pertama, plaintif kedua dan ketiga juga merupakan penghuni-penghuni banglo tersebut. Banglo

- A tersebut telah dibina di bahagian atas tanah di mana di sepanjang cerun bukit di bahagian bawah banglo tersebut, plaintif pertama telah mendirikan tembok setinggi kira-kira 22 kaki pada tahun 1983. Tanah defendan pertama pula terletak di bahagian bawah cerun bukit, bersebelahan dengan tanah plaintif pertama. Defendan pertama memeterai perjanjian pajakan dengan defendan
- B kedua di mana defendan pertama memajak tanah tersebut kepada defendan kedua untuk tempoh sepuluh tahun. Defendan kedua merancang untuk membina sebuah banglo di atas tanah tersebut dan dengan itu, telah melantik defendan ketiga, seorang kontraktor bebas. Untuk membina banglo tersebut, defendan kedua melantik seorang perunding kejuruteraan ('defendan kelima')
- C dan seorang arkitek ('defendan keenam'). Kerja penggalian dijalankan di kawasan tanah defendan pertama dengan jarak kira-kira 20 kaki antara tempat penggalian dengan tembok plaintif pertama. Pada 11 Disember 1993, tembok plaintif pertama roboh, menyebabkan tanah runtuh. Plaintif-plaintif mendakwa bahawa defendan telah menjalankan kerja-kerja penggalian secara
- D cuai dan menyebabkan tembok plaintif pertama roboh. Defendan-defendan menghujahkan bahawa plaintif pertama cuai dalam membina dan mengekalkan keselamatan tembok, mengakibatkan struktur dinding rosak dan dalam keadaan membahayakan. Defendan pertama dan kedua menuntut balas terhadap plaintif pertama bagi kecuaiannya. Walau bagaimanapun, defendan
- E pertama tidak hadir ke mahkamah untuk memberi keterangan bagi membuktikan tuntutan tersebut terhadap plaintif pertama. Di Mahkamah Tinggi, hakim telah memberikan penghakiman beliau memihak kepada plaintif. Penghakiman yang diperolehi adalah terhadap semua defendan kecuali defendan keempat, yang, sebelum perbicaraan, dalam permohonan
- F interlokutori, telah berjaya memohon kepada mahkamah untuk membatalkan tindakan terhadapnya. Tidak berpuas hati, defendan-defendan lain, kecuali defendan ketiga, merayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan defendan defendan dengan kos; menolak tuntutan balas oleh defendan pertama; mengetepikan sebahagian perintah mahkamah:

- (1) Adalah menjadi undang-undang mantap bahawa dalam suatu tindakan bagi kecuaiannya, plaintif hendaklah membuktikan bahawa perbuatan defendan adalah punca langsung yang menyebabkan kerosakan yang dialami oleh plaintif. Tanpa kaitan kausa yang dibuktikan oleh plaintif, tuntutan tersebut tidak boleh berjaya. Plaintif-plaintif gagal untuk membuktikan atas imbalan kebarangkalian bahawa kerja penggalian, yang dijalankan oleh defendan ketiga di atas tanah defendan pertama telah menyebabkan tembok di atas tanah plaintif pertama roboh (lihat perenggan 32–34).
- (2) Punca robohnya dinding plaintif adalah disebabkan oleh ketidakstabilan struktur dan keadaannya yang membahayakan. Kedua-dua saksi pakar mengakui bahawa terdapat keretakan sedia ada pada dinding tersebut.

Ini diburukkan lagi dengan kewujudan tumbuhan yang membesar dalam retak tersebut. Semua ini merupakan tanda-tanda bahawa dinding tersebut sebenarnya sudah rosak dan dalam keadaan yang menggusarkan sebelum ia roboh. Oleh itu, punca kerosakan plaintif adalah keadaan dinding yang membahayakan (lihat perenggan 43).

- (3) Kredibiliti dan keterangan saksi pakar plaintif diragui. Penilaian dan penemuan susulan bagi punca robohnya tembok plaintif pertama dibuat sepenuhnya berdasarkan kepada analisa kestabilan cerun. Walau bagaimanapun, analisa tersebut tidak disediakan olehnya. Oleh itu, dia tidak boleh dikatakan mempunyai pengetahuan peribadi akan analisa atau perkiraan yang dibuat. Untuk memburukkan lagi keadaan, analisa tersebut telah disediakan pada bulan April 1999, bermakna bahawa ia telah disediakan kira-kira enam tahun selepas robohnya tembok tersebut (lihat perenggan 39).
- (4) Hakim Mahkamah Tinggi terkhilaf secara serius dalam kegagalannya untuk memberi pertimbangan secukupnya ke atas keterangan saksi pakar defendan DW7, yang telah menyediakan tiga laporan mengenai punca robohnya tembok plaintif pertama. Dua daripada laporan tersebut berdasarkan penyiasatan di tapak; dan laporan ketiga berdasarkan lukisan oleh plaintif pertama. Hakim Mahkamah Tinggi juga terkhilaf apabila dia memberikan pemberatan yang tidak wajar kepada keterangan PW5 bahawa tembok plaintif melebihi standard minimum dalam faktor keselamatan. Keterangan sedemikian seharusnya ditimbang dengan keterangan pakar DW7 (lihat perenggan 49–51).]

Notes

For cases on adjoining properties, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 929–945.

Cases referred to

Singapore Finance Ltd v Lim Kan Ngam (S'pore) Pte Ltd & Eugene HL Chan Associate (third party) [1984] 2 MLJ 202 (refd)

Appeal from: Civil Suit No S3–23–58 of 1994 (High Court, Kuala Lumpur)

B Thangaraj (Thangaraj & Associates) for the appellant in Civil Appeal No W-02–1731 of 2009.

Mohd Zainuddin Omar (Arshad Azhari & Associates) for the appellants in Civil Appeal No W-02–1732 of 2009.

Christie Soosay Nathan, YK Leong and SK Lit (Lit & Co) for the appellant in Civil Appeal No W-02–1733 of 2009.

Jerry Ling (Lee Ling & Partners) for the respondents in all the three appeals.

A

Mohd Hishamudin JCA (delivering judgment of the court):

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[1] These three related appeals before us are by consent of the parties, to be heard together, namely:

- (a) Civil Appeal No W-02-1731 of 2009;
- (b) Civil Appeal No W-02-1732 of 2009; and
- (c) Civil Appeal No W-02-1733 of 2009.

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[2] These appeals emanate from a High Court case, namely, Kuala Lumpur High Court Civil Suit No S3-23-58 of 1994.

D

[3] At the High Court, the learned judge gave judgment in favour of the plaintiffs. The judgment obtained was against all the defendants except the fourth defendant, Sime AXA Assurance Bhd, who, before the trial, in an interlocutory application, had successfully applied to the court to have the suit against it be struck off.

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[4] All the remaining defendants, except the third defendant, that is to say, Pembinaan BSH Sdn Bhd (thus Pembinaan BSH Sdn Bhd is not a party to these appeals), were dissatisfied with the decision. They are appealing to this court.

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[5] The claim of the plaintiffs in the High Court action was essentially for damages for the tort of negligence allegedly committed by the defendants against the plaintiffs.

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[6] There are also counterclaims by the first and second defendants against the first plaintiff, also for the tort of negligence.

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[7] The learned High Court judge had allowed the plaintiffs' claim, but had dismissed the first and second defendants' counterclaims.

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[8] Having allowed the plaintiffs' claim for negligence, the learned High Court judge did not determine the quantum of damages. Instead he made a further order that damages are to be assessed by the senior assistant registrar.

[9] We are allowing the defendants' appeal with costs, except with regard to the first defendant's counterclaim.

[10] The second defendant is not appealing against the dismissal of its counterclaim. A

[11] We, therefore, set aside the order of the High Court, except that part of the High Court order dismissing the first defendant's counterclaim. B

[12] Our decision is unanimous.

[13] In our judgment, the plaintiffs (the respondents before us) have failed to prove on a balance of probabilities that the defendants (the appellants before us) were guilty of committing the tort of negligence against the plaintiffs. C

[14] In our judgment, the findings of the learned High Court judge are against the weight of evidence, and, therefore, warrant interference by this court. D

[15] We will begin by setting out briefly the facts of the case.

[16] The first plaintiff (Say Chong Sdn Bhd) is a company and the registered owner of a piece of land at Bukit Pantai, Kuala Lumpur. On this piece of land it had erected a double storey bungalow. It was built in 1980. E

[17] The second and third plaintiffs (Dr Ng Say Hong and Mdm Chung Li Khoon) are husband and wife. They are the only shareholders and directors of the first plaintiff company. They and their two children were also occupiers of the bungalow. F

[18] The first plaintiff's land is in fact a hill slope. The said bungalow was built at the uppermost part of the land. Along the hill slope, below the bungalow, the first plaintiff had erected a retaining wall of about 22 feet high and had filled it up with earth brought onto the land from somewhere else. This retaining wall was erected around 1983. The first plaintiff's bungalow is located within this retaining wall. The filled-up retaining wall enabled the first plaintiffs' bungalow to have a garden and some area of level ground as part of its compound. G
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[19] The first defendant is one Mdm Chuah Guat Kooi. Her land is located at the lower part of the hill slope. Her land is adjacent to the first plaintiff's land. I

[20] About 8 – 10 days before the end of November 1993, the first defendant entered into a lease agreement with the second defendant company (Chua Seng

A Sam Realty Sdn Bhd). By this agreement, the first defendant leased out her land to the second defendant for a term of ten years.

B [21] The second defendant company was desirous of building a bungalow on the land that it had leased from the first defendant. So, it appointed the third defendant, a company (Pembinaan BSH Sdn Bhd), as a contractor to build the bungalow. For the construction of the bungalow, the second defendant appointed the fifth defendant (Encik Wan Husin), a qualified civil engineer, as the consulting engineer and the sixth defendant (Encik Abdul Rashid), a qualified architect, as the architect.

C [22] It is not disputed that the third defendant was an independent contractor.

D [23] Excavation work by the third defendant on the first defendant's land began after the second defendant (as lessee) had taken possession of the first defendant's (the lessor) land; and, subsequently, after the third defendant, as the building contractor, had taken constructive possession of the building site. The excavation work began in the first week of December 1993.

E [24] The excavation work was carried out within the first defendant's land. There is a distance of about 20 feet between the excavation point and the first plaintiff's retaining wall.

F [25] On 11 December 1993, the first plaintiff's retaining wall collapsed resulting in a landslide.

G [26] The plaintiffs' allege that the defendants' had carried out the excavation work in a negligent manner and that caused the first plaintiff's retaining wall to collapse.

H [27] The defendants' deny the allegation. Instead, the defendants' allege that the first plaintiff was negligent in constructing and maintaining the safety of the retaining wall resulting in the wall being structurally defective and in a precarious state. And it was this precarious state of the retaining wall that had caused it to collapse, and not the excavation work that was carried out by the third defendant.

I [28] The first and second defendants counterclaim against the first plaintiff for negligence. The first defendant pleads in her statement of defence and counterclaim that the first plaintiff's retaining wall had collapsed onto her land, thereby causing damage to her land.

[29] The second defendant pleads in its statement of defence and counterclaim that the collapse of the first plaintiff's retaining wall onto the first defendant's land had caused the second defendant company to incur financial loss.

A

[30] It is significant to note that despite the first defendant having a counterclaim, yet she did not come to court to give evidence to prove her claim against the first plaintiff.

B

[31] In our judgment, the plaintiffs' have failed to prove on a balance of probabilities that it was the excavation work, that was being carried out by the third defendant (the independent contractor) on the first defendant's land (now leased to the second defendant), that had caused the retaining wall on the first plaintiff's land to collapse.

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[32] It is trite law that in an action for negligence the plaintiff has to prove that the defendant's act was the effective cause of the injury suffered by the plaintiff. Without a causative link being established by the plaintiff, the claim cannot succeed. The passage found in para 2-01 of the text of *Clerk & Lindsell on Tort* (20th Ed), states this basic principle in the following manner:

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In the majority of torts the claimant must show that the defendant's wrongdoing caused him actual damage. In these torts, and indeed in torts actionable per se if substantial damages are sought, the claimant must establish that:

- (1) the defendant's conduct did in fact result in the damage of which he complains, and
- (2) the damage is not in law too remote a consequence of the defendant's wrongdoing.

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[33] As such the plaintiffs' are duty bound to prove that it was the defendants' act which caused the damage and that the damage caused is not too remote to the defendants' act.

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[34] Both the plaintiffs' and the defendants' called expert witnesses to establish the cause of the collapse of the wall. However both the plaintiffs' expert witness and the defendants' expert witness gave differing evidence as to the cause of the collapse of the first plaintiff's retaining wall. The plaintiffs' expert witness, PW5, one Guo Yeang Yang, a civil engineer gave evidence that the cause of the collapse of the first plaintiff's wall was due to the excavation work carried out on the first defendant's land which affected the stability of the soil underneath the plaintiff's retaining wall and thus caused the wall to eventually collapse.

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A [35] The defendants' expert witness, DW7, was one Yee Thien Seng, a geotechnical engineer (who is also a professional consulting engineer) with an impressive curriculum vitae, maintained that the cause of the collapse was the defective construction of the first plaintiff's wall and not the excavation work carried out by the third defendant.

B [36] PW5 prepared a report (exh P18) on the cause of damage to the first plaintiff's property in July 1994, after a site visit. In evidence PW5 stated that he was retained by the first plaintiff immediately after the collapse of the wall for the purpose of carrying out remedial works on the first plaintiff's land, namely to reconstruct the toppled wall.

C [37] Based on his observations as can be found in the report, he concluded that the cause of the collapse of the wall was due to the method of construction by the third defendant, namely in removing earth adjacent to the wall, which weakened the foundation of the wall and removed the restraint provided by existing earth. This caused the wall to move and eventually led to its collapse, which in turn also caused the failure of the existing slope on the first plaintiff's land and caused damage to the first plaintiff's bungalow.

E [38] PW5 also referred to an analysis (exh P44) which was conducted on the stability of the slope on which the retaining wall once stood. The analysis was for the purpose of ascertaining the stability of the slope prior and after the collapse of the retaining wall. PW5 said that the analysis was made after numerous visits were conducted to the site. At all times PW5 maintained that the analysis was prepared by him, but when cross-examined on the same, he admitted that the report was prepared by his engineer, one Robert Teh but was checked by him. Further he admitted that the said Robert Teh was never present during any site visits.

G [39] We, with due respect, find the credibility and evidence of the plaintiff's expert witness in doubt. His evaluation and subsequent findings of the cause of the collapse of the first plaintiff's retaining wall was based heavily on the analysis of the stability of the slope. However, the analysis was never prepared by him. As such he cannot be said to have personal knowledge of the analysis or calculations made therein. To make matters worse, the said analysis was prepared in April 1999, meaning that it was prepared some six years after the collapse of the wall (the wall collapsed in December 1993).

H [40] As we have said earlier, PW5, in his report (exh P18) opined that the cause of the collapse of the retaining wall was due to the excavation work carried out by the third defendant. PW5, however, did not test the stability and structure of the retaining wall. Had he done so, perhaps the inferences drawn from his findings would have been different. In cross-examination he admitted

that the first plaintiff's wall had been badly constructed and that the reinforcement steel holding the wall had corroded. The cause of the corrosion was held to be due to cracks on the wall which encouraged water to seep in and corrode the reinforcement steel. The corrosion would over time lead to the wall collapsing once the reinforcement gives way.

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[41] This evidence, we find, is consistent with what the defendants' expert evidence had to say about the collapse of the retaining wall.

[42] According to the evidence of the defendant's expert witness, DW7, based on his investigation, the collapse of the first plaintiff's retaining wall was not due to the excavation work carried out on the first defendant's land but was due to the structural inadequacy of the first plaintiff's wall. The conclusion made by DW7 on the collapse of the wall in the final report which he prepared is reproduced here:

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The retaining wall built up to hold up Lot 40536 had grossly inadequate reinforcement content. Its collapse was solely caused by its structural inadequacy.

The fact that the wall did not collapse earlier cannot be taken to argue that its construction had been adequate. The timing of its collapse during the course of the excavation at Lot 40527 must therefore be pure coincidence.

E

[43] Having examined and analysed the evidence of both the expert witnesses, we are of the opinion that the cause of the plaintiff's wall collapsing was due to its precarious structure and condition. Both the expert witnesses admitted that there were existing cracks on the wall. This was made worse by the existence of plants growing within the cracks. All these are indications that the wall was already defective and in a deplorable state prior to its collapse. Therefore we find that the effective cause of the plaintiff's injury was due to the precarious condition of the wall. The excavation work carried out by the third defendant could have hastened the collapsing of the wall, if any, but cannot be the effective cause of the wall collapsing.

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[44] In this regard, the 'but for' test is important in determining whether or not the defendants' act was the main factor causing the damage suffered by the plaintiffs'. The text in para 2-09 in *Clerk & Lindsell* states that:

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The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The 'but for' test asks: would the damage of which the claimant complains have occurred 'but for' the negligence (or other wrongdoing) of the defendant? The first step in establishing a causation is to eliminate irrelevant causes, and this is the purpose of the 'but for' test. The courts are concerned, not to identify all of the possible causes of the particular

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A incident, but with the effective cause of the resulting damage in order to assign responsibility to that damage. The ‘but for’ test asks: would the damage of which the claimant complains have occurred ‘but for’ the negligence (or other wrongdoing) of the defendant?

B [45] In our judgment, we find on a balance of probabilities that the wall collapsed because of its defective structure and its precarious state. We find that
C PW5 failed to establish a causal link between the excavation work carried out by the third defendant which severely affected the stability of the slope, on which the first plaintiff’s wall stood, with the subsequent collapse of the wall.

[46] As such, we find that the plaintiffs’ have failed to establish a causative link in proving that the collapse of the retaining wall was caused by the carrying out of the excavation work by the third defendant.

D [47] While both the plaintiffs’ and defendants’ produced expert witnesses in court, the learned High Court judge, with respect, failed to give due consideration to the evidence of the expert witness called by the defence. This
E is how the learned judge treats the testimonies of the experts:

27. Both the Plaintiffs and Defendants had called expert evidence to substantiate each other’s case. But expert evidence is only persuasive on the court which has to finally determine the liability. Having considered the expert testimony of both sides
F I am however inclined to say that whatever the technical opinions given, the fact remains that even though the Plaintiffs Retaining Wall was built on a land filled slope, it had remained intact for over 10 years since it was built. I do not think one can be wrong to assume that over the 10 years there must have been a lot of inclement weather which could have caused the said wall to collapse at one point or
G other if it was technically faulty. But it only collapsed after the earthwork was undertaken by the Defendants when the landslide occurred, thereby causing the Plaintiffs Retaining Wall to collapse.

H [48] In the present case, the court was faced with two conflicting expert evidence on the cause of the collapse of the first plaintiff’s wall. In treating conflicting expert evidence, the court, besides examining the credibility of the experts, should also examine the scientific grounds and facts relied by the experts and whether, when taken in totality, the inferences drawn from their findings are sound or otherwise (see *Singapore Finance Ltd v Lim Kan Ngam (Spore) Pte Ltd & Eugene HL Chan Associate (third party)* [1984] 2 MLJ 202).
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[49] In our judgment, the learned High Court judge fell into serious error in failing to give adequate consideration to the evidence of the defendants’ expert witness DW7, who had prepared three reports on the cause of the collapse of

the first plaintiff's retaining wall. Two of the reports were based on his investigation on site; and the third report was based on drawings supplied by the first plaintiff.

[50] We have carefully examined the reports of this witness and we are of the view that his evidence as to the cause of the collapse is more credible as opposed to the evidence of the plaintiffs' expert witness, PW5.

[51] We wish to add that the learned High Court judge, in his grounds of judgment, fell into error when he gave undue weight to the evidence of PW5 that the plaintiffs' wall was above the minimum standard in the factor of safety (FOS). Such evidence should have been weighed against the expert evidence of DW7. His failure to do so is a misdirection which warrants interference by this court.

[52] We are also dismissing the first defendant's appeal on the dismissal of her counterclaim. As we have said earlier, at the trial before the High Court, she had not come to court to testify as to what damage she had suffered as a result of the collapse of the first plaintiff's wall. Therefore, the learned High Court judge was correct in dismissing her counterclaim against the first plaintiff.

[53] Appeals allowed with costs; except the first defendant's appeal on dismissal of her counterclaim.

[54] The first defendant is not entitled to costs against the plaintiff in regard to the main appeals as her cross-appeal is dismissed with no order as to costs.

Defendants' appeal allowed with costs; first defendant's counterclaim dismissed; order of court below set aside in part.

Reported by Afiq Mohamad Noor

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